



OFFICE OF THE OHIO PUBLIC DEFENDER

# Reagan Tokes Act Primer

SB 201 Effective March 22, 2019





# Roadmap

- **Criminal Process Impact**
  - Sentencing
  - Release Hearings
  - New Charges
  
- **Potential Appellate issues**
  - Ex-Post Facto
  - Sentencing hearing & entry
  - Release Hearings





# Sentencing

- Indefinite Sentencing – F1s & F2s
  - Prior law sentence = Reagan Tokes minimum sentence
  - Max sentence = Min +50%
- Multiple count consecutive sentences
  - As prior law +50% of longest sentence (note this for later)
- New sentencing hearing & entry language – 2929.19





# Release Hearings

- Exceptional Conduct (5-15%) Early Release Hearing
  - Mandatory court hearing (upon DRC request)
  - “Presumptive earned early release”
  - Statutory factors to rebut
  - Appealable

Exceptional Conduct Hearing Roles

	Prosecutor	Victim	Defendant
Attend Hearing	Yes	Yes	????
Written Presentation	Yes	Yes	????
Oral Presentation	Yes	No	????





- Minimum Sentence Presumptive Release Hearing
  - DRC Administrative Hearing
  - Statutory factors to rebut presumptive release
  - Appeal Right ????
    - Not same as parole b/c vested liberty interest in release
    - Uncharted
  - If rebutted, then DRC must indicate time to serve before reconsideration





# New(ish) Charges

## Pandering & Use in Nudity Oriented Material

- New variant for “impaired person”
  - Ability to resist or consent is substantially impaired by
    - Mental Condition
    - Physical Condition, OR
    - Advanced Age
  - AND Defendant knows or has reasonable cause to know the same
- Lower level felony compared to the “minor” versions
  - Applies to:
    - Pandering obscenity - 2907.321
    - Pandering Sexually Oriented Material - 2907.322
    - Use in Nudity Oriented Material/Performance - 2907.323





# Potential Appellate Issues





# Ex-Post Facto Issue

- Mostly avoided by careful drafting
- BUT, Pre-Reagan Tokes felonies enhanced when:
  - multiple count,
  - consecutive sentences,
  - Pre & post Reagan Tokes crimes,
  - AND pre-Reagan Tokes crime sentenced higher
- Sentence = sum + 50% of > indefinite OR definite sentence  
(2929.144(B)(2))
- Qualifying felony
  - “. . . On or after the effective date of the section.” 2929.144(A)
- Definite term felony
  - “not qualifying felonies” 2929.144(B)(2)







# Sentencing Hearing & Entry Issues

- New requirement for
  - sentencing hearings (2929.19(B)(2)(c))
    - AND
  - sentencing entries (2929.144(C))
- Specific Issues
  - Judges neglecting new requirements
  - Possibly analogous to some PRC case law (State v. Jordan, 2004-Ohio-6085)
    - Entry authorizing executive to: (Woods v. Telb, 89 Ohio St.3d 504)
      - Rebut presumptive release
      - Hold administrative hearings
  - BUT maybe voluntary dismissal suggestion (Hernandez v. Kelly, 2006-Ohio-126)





# Release Hearing Issues

- Exceptional Conduct Release Hearings
  - Determination of rebuttal factor
    - Abuse of Discretion?
    - Criminalizing Homelessness (Equal Protection - Cruel & Unusual Punishment)
      - Defendant NOT residing @ a HWH, reentry center, or licensed community residential center AND does not have any residence w/ a fixed address
  - Right to Counsel?
  - Right of Defendant to be present?
    - Critical Stage?
    - “Presumptive earned early release” going in
  - Right of Counsel on Appeal?





- DRC presumptive release hearing(s)
  - SHALL release
    - UNLESS rebutted
  - Likely run by non-attorneys
  - Problematic Criteria (2967.271(C))
    - “Violations of law that were not prosecuted”
      - Due process concerns?
  - Review/ Appeal ??
    - Greater liberty interest

